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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Petitioner,

versus

NOLAN LEE BUSH,
Respondent

REPLY TO THE BRIEF FOR RESPONDENT

DAN MOODY
Austin, Texas

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Missouri-Kansas-Texas Railroad Company respectfully replies to the Brief for Respondent.

This suit was brought and prosecuted under the Federal Employer's Liability Act.

In *Davis, Director General of Railroad, et al, vs. Green Administrator*, 260 U. S. 349, 351-352, the action was for damage resulting from McLendon, an

engineer, having killed Jesse Green, a conductor. In the caption of the opinion it was said that the railroad company is not liable under the Federal Employers' Liability Act for a wanton, wilful act of an employee acting out of the scope of his employment. Justice Holmes writing for the court stated:

> "The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey — in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondent superior* applies."

In the instant case a brakeman seated in the cupola of a caboose was struck in the eye by a rock or other hard missile thrown by a trespasser in the right of way of the railroad. The result was such that the brakeman lost his eye. The act was a criminal

offense of the grade of felony under the Texas laws. Article 1166, Vernon's Texas Penal Code, provides:

> "Whoever shall wilfully and maliciously * * * put out an eye * * * shall be confined in the penitentiary not less than two nor more than ten years."

The railroad could not reasonably have foreseen that such a wanton act would be committed.

Atlantic Coast Line Railroad Company vs. Southwell, Administratrix, 275 U. S. 64 was an action brought against the railroad by the Administratrix for the death of her husband which the administratrix alleged that the petitioner railroad had "with gross negligence wilfully and wantonly caused, permitted and allowed." The question was whether there was any evidence that the death resulted in whole or in part from the negligence of any officer of the petitioning road, under the law as applied by this Court. There was friction between Dallas and Southwell; Fonvielle, yard master, admonished Dallas that he avoid seeing Southwell; Fonvielle shortly thereafter saw Dallas and Southwelll approaching each other; Dallas shot Southwell. The court held that, "It appears to us extravagent to hold the petitioner liable in a case like this."

See St. Louis-San Francisco Ry. Co. vs. Mills, 271 U. S. 344.

In *Missouri Pacific Railroad Co. vs. David, Administratrix*, 284 U. S. 460, David, employed to protect the company's trains, was murdered in the night. The administratrix sued for damages under the Federal Employers' Liability Act and obtained a

favorable verdict. David's duties were to act as a "train rider" or guard for the cars. There were desperate men who were engaged in robbing the cars. McCarthy, known to be associated with a criminal band, was employed and he agreed, when possible, to furnish advance information. McCarthy knew of a plan to rob a train to which David was assigned, and in violation of his duty failed to notify the proper parties. David did not receive the information and failed to take the necessary precautions and exposed himself to being shot. The court held:

> "The established rule is that in proceedings under the Federal Employers' Liability Act assumption of the risk is an adequate defense. * * *
>
> "Under the circumstances disclosed by the record, clearly, we think, David assumed the risk of the default which, it is said, resulted in his death. He understood the nature of his employment and the incident dangers. He well knew that he was subjecting himself to murderous attacks by desperadoes. There was no promise to give him special warning or protection. Even if he had knowledge of McCarthy's employment (and this is far from certain) he must have appreciated the utter unreliability of the man and the probable inability of the master to obtain timely information through such a medium. He could not properly expect to be protected against criminals, whom he was employed to fight, through treachery by one of their associates. The common employer, notwithstanding efforts to obtain warning, actually knew

> nothing of the criminal plan. If we accept respondent's view of the facts, David assumed the risk of the negligent action of which complaint is now made."

In the case at hand respondent Bush knew, or in the exercise of ordinary care he should have known from the testimony telling of the many rocks and other objects thrown at the cars, that in sitting at the open window of the caboose he was exposing himself to injury. He was not taking any precaution against a rock or other hard missile being thrown at the open window where he was seated.

The subject of interest in this case is that a rock was thrown which struck and injured Bush's eye. The identity of the person who threw the rock is unknown. Bush was not certain that his injury was the result of a rock or other hard missile having been thrown, striking Bush in the eye (S.F. Vol. 3, pp. 458-459, 462, 468-472, 473, 480, 482-485, 487). The act that injured Bush's eye was a criminal act punishable by imprisonment. (Article 1339 Vernon's Penal Code of the State of Texas) In its pertinent parts, the statute is, as follows:

> "Whoever shall wilfully or maliciously throw a stone or other missile * * * into any engine, tender, coach * * * or any other car of any moving train on any railroad * * * shall be fined not less than five nor more than one thousand dollars or be confined in jail not less than ten days nor more than two years."

Instead of trying such a case, respondent attempts to impose punishment upon the railroad by making proof of other like crimes instead of proving who committed this crime. This is not a case that can be made by proof that a person riding in the cupola of the caboose was struck in the eye by an unidentified person.

The question is who inflicted the injury. It can not be charged to the train crew. It can not be charged to the railroad. It was not inflicted by the railroad or any of its employees.

It was inflicted by a criminally inclined bystander. It was not due to any act of petitioner. The railroad, entirely innocent of any wrongdoing, is asked to pay satisfaction for an injury which was inflicted by a person unknown to the railroad, and unidentified by any person connected with the railroad. It cannot be said that the officials of the railroad, nor can it be said that the train crew, nor can it be said that the Superintendent of the division of the railroad could have foreseen and prevented the injury sustained by the respondent.

The attempt is to show the railroad liable by reason of the fact that the windows in the caboose were not equipped with shatter proof glass. There was glass in the windows of the cupola, but the glass was pushed forwards leaving an opening in the cupalo of the caboose right at respondent's side. Some member of the train's crew, likely respondent, was responsible for the open window. He was next to the window. Had the window been closed who can say that the glass would not have broken the force of

the rock or missile or that the glass would not have deflected the rock or missile.

It is respectfully submitted that this court should reverse the judgments of the lower courts and enter judgment for the railroad; and, if denied that relief, then the judgment should be reversed and the cause remanded for trial.

Respectfully submitted,

DAN MOODY

Attorney for Petitioners